

BEFORE THE
GOVERNING BOARD OF THE
PATTERSON JOINT UNIFIED SCHOOL DISTRICT
STANISLAUS COUNTY
STATE OF CALIFORNIA

In the Matter of the Accusation/Non-
Reemployment of Certificated Employees of
the Patterson Joint Unified School District:

OAH No. 2011030267

SHIVAUGN ALVES
MARLENE AVILA
DONNA CLARKE
KIM ERVIN
KAREN FAUSS
MICHELLE HAMILTON
TIFFANY HOOD
JAYNE LOBAO
KELLENE MADRUGA
TARAH McCOMAK
JEREMY ROSS
MARIANNE THOMPSON
APRIL WEAVER,

Respondents.

PROPOSED DECISION

Administrative Law Judge Catherine B. Frink, Office of Administrative Hearings (OAH), State of California, heard this matter in Patterson, California, on April 13, 2011.

Chesley D. Quaide, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented the Patterson Joint Unified School District (District).

Ernest H. Tuttle IV, Attorney at Law, represented all of the respondents.

Oral and documentary evidence was presented and the parties offered oral closing arguments. The record was closed and the matter was submitted for decision on April 13, 2011.

FACTUAL FINDINGS

1. Esther Corral-Carlson, Ed.D., is the District Superintendent. Philip Alfano is the Assistant Superintendent, Human Resources. Their actions, and those of the District's Governing Board (Board), were taken solely in their official capacities.

2. Respondents Shivaugn Alves, Marlene Avila, Donna Clarke, Kim Ervin, Karen Fauss, Michelle Hamilton, Tiffany Hood, Jayne Lobao, Kellene Madruga, Tarah McComak, Jeremy Ross, Marianne Thompson, and April Weaver are all certificated employees of the District.

3. The District serves approximately 5,500 students in kindergarten through twelfth grade. The District has nine school sites and approximately 267 certificated employees.

4. The District is facing a budget shortfall for the 2011-2012 school year, and needs to reduce services to remain solvent.

5. On March 10, 2011, the Board adopted Resolution No. 030711(a), entitled "Resolution of the Governing Board of the Patterson Joint Unified School District Regarding the Reduction or Discontinuance of Particular Kinds of Services (Certificated Layoff)" (Layoff Resolution) reducing or eliminating particular kinds of services (PKS) affecting 21.6 full-time equivalent certificated positions (FTE).

6. The Layoff Resolution was based on the Superintendent's recommendation that it was necessary to reduce or discontinue PKS no later than the beginning of the 2011-2012 school year. In making her recommendation, the Superintendent took into account all positively assured attrition (i.e., resignations or retirements, and additional attrition which may occur before the start of the 2011-2012 school year) which was known to the District as of the date of adoption of the Layoff Resolution. According to Mr. Alfano, there were no anticipated resignations or retirements to be taken into account as of the date of hearing.

7. The Layoff Resolution states that the Board determined that it was necessary to reduce the following PKS of the District no later than the close of the current school year:

<u>Services</u>	<u>Number of FTE Positions</u>
Home Economics	.60 FTE
English	2.00 FTE
Science	2.00 FTE
Art	1.00 FTE
Social Studies	2.00 FTE

Counselor	1.00 FTE
Assistant Principal	1.00 FTE
Elementary Teachers	<u>12.00 FTE</u>
 TOTAL	 21.60 FTE

8. As a result of the above PKS reductions and/or eliminations, the Board determined that it was necessary to decrease 21.60 FTE positions for certificated employees in the District no later than the beginning of the 2011-2012 school year, in accordance with Education Code section 44955.¹

9. The Layoff Resolution directed the Superintendent or her designee to send appropriate notices to all employees whose services would be terminated by virtue of the Board's action.

10. Before March 15, 2011, the Superintendent caused a letter entitled "Notice of Recommendation That Your Services Will Not Be Required For The Ensuing School Year (2011-2012)" (Preliminary Notice) to be served in person or by certified mail on each of the employees affected by the PKS reductions and/or eliminations set forth in the Layoff Resolution. The Preliminary Notice advised that the Superintendent had recommended to the Board that the recipient be given preliminary written notice that his/her services would be terminated at the close of the current school year due to reductions in PKS. The Preliminary Notice set forth the reasons for the recommendation and attached a copy of the Layoff Resolution.

11. Respondents timely filed a Request for Hearing to determine whether there was cause for not reemploying them for the 2011-2012 school year.

12. Respondents are all permanent certificated employees of the District.

13. On March 24, 2011, the Superintendent signed the Accusation, and caused it to be served on respondents. Respondents timely filed Notices of Defense.

14. At or before the commencement of the hearing, the District rescinded the Preliminary Notices of the following respondents, who shall be retained for the 2011-2012 school year: April Weaver, Jeremy Ross, and Jayne Lobao.

Development of the District's Seniority List

15. Seniority is the relationship between the teachers within a school district. Among the teachers credentialed to provide a given service, greater seniority in the district gives a greater legal entitlement to a position. Seniority is defined as

¹ All statutory references are to the California Education Code unless otherwise indicated.

the date upon which an employee first rendered paid services in a probationary position. (§ 44845.)

16. Barbara McCleskey is a Human Resource Specialist with the District. One of her job duties is to maintain the District's seniority list for certificated staff. Ms. McCleskey reviews employee files and makes corrections and additions to the District's database based on information provided by staff. Ms. McCleskey used information derived from the database and employee files to designate employee status (substitute, temporary, probationary, or permanent) and to determine seniority dates. In January or early February 2011, the District emailed a copy of the certificated seniority list to all certificated employees, so that they could verify the information on file with the District relating to their seniority date, credentials and coursework. The District made corrections when employees provided information about new credentials to be posted. The certificated seniority list was further updated on April 6, 2011.

Seniority Date Challenges

17. Respondents Marianne (Zamzow) Thompson (7/6/07), Tiffany Hood (7/6/07), Kellene Madruga (7/6/07), and Shivaugn Alves (7/31/07), were all employed by the District as temporary certificated employees for the 2006-2007 school year. Ms. Thompson's first date of service was July 31, 2006; Ms. Hood's first date of service was August 31, 2006; Ms. Madruga's first date of service was January 22, 2007; and Ms. Alves' first date of service was July 31, 2006. All four respondents were re-employed by the District in temporary positions for the 2007-2008 and 2008-2009 school years. On October 6, 2008, the Board voted to change the status of respondents from temporary to second year probationary, and credited each of the respondents with one year of seniority, back to the dates when they began service in their temporary contracts for the 2007-2008 school year.

18. Respondents Thompson and Alves each testified that she met separately with Ms. McCleskey in the summer of 2006 to sign her contract for temporary certificated employment. Each respondent testified that Ms. McCleskey told her that, as new people were hired, her status would be "moved up," i.e., that she would be moved into a vacant probationary position, if available, and new hires would fill temporary positions.

19. Ms. McCleskey testified that she told all temporary employees that, as new people were hired, there was a possibility that they would moved up to probationary, but the recommendation for probationary status "was at the discretion of the principal." Ms. McCleskey stated that she could not "promise" to change the status of any certificated employee, as that decision is ultimately determined by Board vote.

20. Certain certificated employees hired after August 31, 2006, including Marlene Avila (8/9/07), were employed as probationary employees, rather than as temporary employees, while the above respondents were re-hired as temporary employees for the 2007-2008 school year.

21. Respondents contended that the District's granting of probationary status to some employees, and not respondents Thompson, Hood, Madruga, and Alves, was arbitrary. They further argued that the District reneged on a commitment made to respondents Thompson and Alves when they were hired. These issues are beyond the scope of this proceeding. There was no evidence or argument to suggest that respondents Thompson, Hood, Madruga, and Alves were improperly classified as temporary employees in the 2006-2007 and 2007-2008 school years under applicable law. The evidence did not establish cause to change the seniority dates of respondents Thompson, Hood, Madruga, and Alves.

Skippping and Bumping

22. Section 44955, subdivision (b), provides that no senior employee may be terminated while any less senior employee is retained to render a service which the more senior permanent employee is "certificated and competent" to render. Section 44955, subdivision (c), provides that the governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. "It [is] the district's obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possess[es] the seniority and qualifications which would entitle him/her to be assigned to another position." (*Bledsoe v. Biggs Unified School District* (2008) 170 Cal.App.4th 127, 137.) The process by which the district identifies those employees who are more senior and who are competent to perform a particular kind of service or teach a particular subject is known as "bumping."

23. The Layoff Resolution stated, in part, that "'competency' for the purpose of Education Code section 44955 shall be determined upon current possession of a preliminary or clear credential for the subject matter or grade level and the certificated employee having taught the class to which he/she will be assigned at the beginning of the 2011-2012 school year at least one (1) semester in the past ten (10) years."

24. Section 44955, subdivision (d)(1), states that, "[n]otwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority [if] . . . [t]he district demonstrates a specific need for personnel to teach a specific course or course of study, . . . and that the certificated employee has special training and experience necessary to teach that course or course of study . . . which others with more seniority do not possess." This deviation from seniority order is known as "skippping."

25. In order to deviate from seniority order and skip a junior employee, the District must do the following:

(A) Demonstrate that it has a specific need for personnel to teach a specific course or course of study;

(B) Establish that special training and experience are necessary to teach that course or course of study, and state with specificity what special training and experience are required;

(C) Show that no senior certificated employee has the necessary special training and experience; and

(D) Show that a less senior certificated employee does have the necessary special training and experience.

Implementation of Layoff

26. District staff used the certificated seniority list in identifying employees affected by the PKS reductions. District staff identified the individuals serving in the positions affected by the PKS reductions. District staff then identified the least senior persons occupying the positions affected by the PKS reductions.

27. When the least senior persons occupying the positions affected by the PKS reductions were identified, District staff looked at each individual's credentials to determine whether he or she could displace any less senior certificated employees.

28. Before March 15, 2011, District staff served the Preliminary Notice identified in Finding 10, on the most junior employees affected by the PKS reduction, as set forth in further detail below.

Reduction of 12.00 FTE Elementary Teachers

29. The following respondents holding Multiple Subject (MS) credentials were affected by the reduction of elementary teacher services:² Michelle Hamilton (8/1/06); Kim Ervin (8/18/06); Karen Fauss (8/21/06); Marianne Thompson (7/6/07); Tiffany Hood (7/6/07); Kellene Madruga (7/6/07); Shivaugn Alves (7/31/07); Donna Clarke (8/2/07); and Marlene Avila (8/9/07).

² All respondents hold a Cross-cultural Language and Academic Development (CLAD) certificate or English Learner (EL) authorization. None of the respondents hold a Bilingual, Cross-cultural, Language and Academic Development (BCLAD) certificate.

Skippping of Junior Bilingual Dual Immersion Language Program Teachers

30. The District operates a Bilingual Dual Immersion Language Program (BDILP) at three schools: Walnut Grove School (grades K-8), Grayson Charter (grades K-5), and Creekside Middle School (grades 6-8). The goal of the program is for students to be bilingual and biliterate (speaking, reading, and writing) in both English and Spanish. Students in a particular grade rotate between two teachers, one of whom teaches primarily in English, and one primarily in Spanish. The BDILP teachers are required to hold a BCLAD credential. The teaching assignment (primarily English or primarily Spanish) may vary from year to year, depending on the needs of the District.

31. Respondents contend that they all teach EL students in their classes, and that they have the special training and experience to teach at least the English portion of the BDILP. This contention was not persuasive. The purpose of EL instruction is to use various strategies so that students who do not speak English as their primary language will achieve English proficiency. The experience and training to instruct students in both English and Spanish, to achieve proficiency in both languages, justify the requirement that personnel have a BCLAD certificate to teach in the BDILP. Furthermore, Mr. Alfano testified that a BCLAD certificate is required to comply with No Child Left Behind (NCLB).

32. Applying the skipping analysis in Finding 25, the District demonstrated the need for personnel to teach in the BDILP; the special training and experience needed to teach in the BDILP includes possession of a BCLAD certificate; none of the respondents possess the necessary special training and experience, i.e., the required BCLAD certificate; and the junior teachers identified by the District do possess the necessary special training and experience to teach in the BDILP.

Skippping of EL Coach

33. Certificated employee Toney Henry (7/7/08) holds an MS credential with CLAD certificate, plus a Level I Education Specialist Instruction Credential. Ms. Henry occupies the 1.0 FTE position of Teach on Special Assignment: English Learner Programs (EL Coach). Ms. Henry did not receive a Preliminary Notice, and she will be retained for the 2011-2012 school year.

34. The EL Coach is a categorically funded position. The EL Coach is not a classroom teacher. The duties of the position include data analysis, staff development, and modeling instruction for teachers. The EL Coach works with EL students at school sites, and monitors processes for categorical compliance. The EL Coach job description describes the following “Desirable Qualifications:”

Knowledge of:

- English Language Development programs
- SIOP and other EL strategies
- Norm Referenced and California Standards Tests assessments
- Instructional Materials
- Categorical Programs and Projects
- Computer Technology and Programs
- Bilingual/Spanish

Ability to:

- Prepare and organize Title III, EIA and other related programs;
- Collect student and staff data;
- Organize, compile and distribute pertinent assessment data, including CELDT testing and reclassification of students;
- Create and maintain assessment and categorical program reports;
- Assist with instructional materials for site principals and staff;
- Assist site principals in implementation of categorical programs' and
- Provide staff development for teachers of English Learners.

Experience:

- Three years of teaching experience. A minimum of one year experience teaching in categorical programs such as EL, Title I, Title III

Credential:

- California teaching credential, CLAD (BCLAD preferred)

35. The District contended that none of the respondents possessed the skills and ability to perform the duties of the EL Coach. However, the District failed to establish what special training and experience were necessary to serve in the EL Coach position. It conceded that all of the respondents met the minimum requirements for the position: all hold valid California teaching credentials and CLAD certificates or equivalent EL certifications, and all have the requisite three years of teaching experience and at least one year of experience teaching in categorical programs. The District attempted to argue that Ms. Henry was the best qualified person for the position. However, that is not the standard articulated by

section 44955, subdivision (d). Applying the skipping analysis in Finding 25, the District failed to demonstrate that it had cause to skip Ms. Henry. Michelle Hamilton is the most senior respondent identified for layoff. She holds the appropriate credential and certification, and has the required experience to perform the duties of the EL Coach. Therefore, the District shall rescind the Preliminary Notice issued to Ms. Hamilton and dismiss the Accusation as to her. Ms. Hamilton shall be retained for the 2011-2012 school year.

Reduction of 2.00 FTE Social Studies

36. Respondent Tarah McComak (9/13/10) holds a single subject social science credential. She received a Preliminary Notice as a consequence of the reduction of 2.00 FTE social studies as reflected in the Layoff Resolution. Ms. McComak is the least senior certificated employee with a credential to teach social studies. She was properly identified for layoff.

Welfare of the District and Its Students

37. The Superintendent correctly identified the certificated employees providing the particular kinds of services that the Board directed be reduced or discontinued. Except as otherwise noted, no junior certificated employee is scheduled to be retained to perform services which a more senior employee is certificated and competent to render. The reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils, within the meaning of Education Code section 44949.

LEGAL CONCLUSIONS

1. As set forth in the Findings, all notice and jurisdictional requirements set forth in sections 44944 and 44945 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen, supra*, 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Layoff Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

2. The Governing Board may reduce, discontinue or eliminate a particular kind of service and then provide the needed services to the students in another manner. (*Gallup v. Board of Trustees* (1996) 41 Cal.App.4th 1571; *California Teachers Association v. Board of Trustees of Goleta Union School Dist.* (1982) 132 Cal.App.3d 32.) A school board may reduce services within the meaning of the statute either by determining that a certain type of service shall not be performed at all

or by reducing the number of district employees who perform such services.
(*Rutherford v. Board of Trustees of Bellflower Unified School District* (1976) 64 Cal.App.3d 167.)

3. The services identified in Resolution No. 030711(a) are particular kinds of services that may be reduced or discontinued under sections 44949 and 44955. The Board's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and pupils within the meaning of section 44949.

4. As set forth in Findings 17 through 21, respondents did not establish cause to change the seniority dates of respondents Marianne Thompson, Tiffany Hood, Kellene Madruga, and Shivaugn Alves.

5. As set forth in Findings 30 through 32, the District properly skipped junior employees serving in the BDILP.

6. As set forth in Findings 33 through 35, the District did not establish cause to skip employee Toney Henry. Therefore, the District shall rescind the Preliminary Notice and dismiss the Accusation as to Michelle Hamilton, the most senior respondent identified for layoff by the District.

7. With regard to the remaining respondents, as set forth in the Findings and Legal Conclusions, the District has established that no employees junior to respondents are being retained to perform the services which respondents are certificated and competent to render.

RECOMMENDATION

1. The Accusation is dismissed as to respondent Michelle Hamilton. The District shall rescind the Preliminary Notice issued to Ms. Hamilton, and she shall be retained for the 2011-2012 school year.

2. The District may give notice to the remaining respondents in inverse order of seniority that it will not require their services for the 2011-2012 school year.

Dated: April 21, 2011

CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings